

SEP 7 1979

MICHAEL DOPAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1978
No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY
GENERAL OF THE STATE OF NEW YORK, SPECIAL
STATE PROSECUTOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF

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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979**

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

-against-

RODERICK C. LANKLER, DEPUTY ATTORNEY
GENERAL OF THE STATE OF NEW YORK,
SPECIAL STATE PROSECUTOR,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF NEW YORK**

PETITIONER'S REPLY MEMORANDUM

The only important point in respondent's brief, from the standpoint of whether this Court should grant a Writ of Certiorari, is his interpretation of the scope and significance of this Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972). What he contends about *Branzburg* amounts to a convincing argument in support of the petitioner's request that the writ be granted.

On Page 12 of his brief, respondent reads this Court's majority opinion in *Branzburg* as if it held that the only testimonial

privilege for unofficial witnesses this Court will ever recognize is the Fifth Amendment privilege against compelled self-incrimination, and as if it meant that this Court would not recognize another one under any circumstances, either for newsmen or anyone else. In that vein, the respondent, on page 14 of his brief, states:

"It thus emerges as the prevailing law that with respect to all First Amendment freedoms in grand jury situations, the competing interests are *ipso facto* balanced in the state's favor, a *bona fide* grand jury inquiry constituting *per se* the state's 'compelling interest'."

This plainly means that, unless this Court grants a Writ of Certiorari, the New York Court of Appeals holding in this case, and the declination of this Court to grant review, will be interpreted by the respondent and all other Federal and State prosecutors in the nation as a green light to override the First Amendment rights of all witnesses called before a grand jury, without any need for a balancing test, regardless of the circumstances. The single exception to the sweeping rule that respondent argues for would be where a witness is able to carry the virtually unsupportable burden of demonstrating that the grand jury is proceeding in bad faith.

We ask that this Court take the opportunity to make a further statement about testimonial rights under the First Amendment that will put its *Branzburg* holding in proper focus for those who, like the respondent, seem to be seriously misinterpreting it. The long-term prejudicial impact upon clergymen will be incalculable.

Lastly, petitioner finds it necessary to clarify a critical point: there has been no doubt shed as to the petitioner's contention that his testimony before the grand jury was purely repetitive and totally unnecessary when compared with the more direct and accurate evidence the grand jury *already possessed*.

Respondent, therefore, misses the point when he suggests that petitioner "curiously" finds the within case dissimilar in this respect from *Branzburg*. *Brief in Opposition* at 15. What the *Branzburg* majority rejected was the shifting of the burden upon the grand jury to go out and seek and exhaust all alternative sources. In the case at bar, it was *petitioner's* testimony that was unnecessary in light of highly accurate evidence *already possessed* by the grand jury (i.e. tape recordings of petitioner's voice). What the grand jury was requesting, quite simply, was the petitioner to re-create those very recordings in narrative fashion. In this sense, the "alternative sources" element of *Branzburg* is not present in the matter *sub judice*.

SUMMARY

The importance of the matters raised herein to clergy and communicants cannot be underestimated, as the *amicus* brief accurately points out. Moreover, the ease with which the Court's holding in *Branzburg* has been extended into an area so jealously guarded from unnecessary governmental intrusion portends even greater concerns in the future lest review be granted.

CONCLUSION

**THE PETITION FOR WRIT OF CERTIORARI
SHOULD BE GRANTED**

Dated: New York, New York
August, 1979

Respectfully submitted,

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